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FILED
MAR 26 1959
JAMES R. BROWNING, Clerk

No. 798

IN THE

Supreme Court of the United States

DONALD O. SHAFFER ..... Petitioner

vs.

JAMES EVANS ..... Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

DONALD O. SHAFFER.....Petitioner

vs.

JAMES EVANS.....Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petition of Donald O. Shaffer respectfully prays for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review the decision of said Court rendered the 29th day of December, 1958.

In support of such petition petitioner respectfully shows to the Court:

(a) No official or unofficial report of the opinion sought to be reviewed has been published. A copy of said opinion appears in the certified record of the court below and as an Appendix to this petition.

(b) The grounds on which the jurisdiction of this court is invoked is as follows:

(1) The date of the judgment sought to be reviewed is December 29, 1958, and the time of its entry was on the same date.

(2) No order respecting a rehearing has been made.

(3) The statutory provision believed to confer on this court jurisdiction to review the judgment or decree in question is set forth in Paragraph (b) of Rule 19, Revised Rules of the Supreme Court of the United States, 28 U. S. C. A.

(c) The question presented for review is that the court below erred in affirming the order and judgment of the United States District Court for the Eastern District of Oklahoma refusing to dismiss without prejudice a suit at law brought by petitioner against respondent and dismissing the same with prejudice to the bringing of another action on the same cause of action.

(d) The statute which the case involves is: Federal Rules of Civil Procedure, Rule 41 (a) 2, U. S. C. A., as follows:

(2) BY ORDER OF COURT. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.

(e) A concise statement of the case containing the facts material to the consideration of the question involved is as follows:

Petitioner, a resident of Arkansas, filed suit in the United States District Court for the Eastern District of Oklahoma against respondent, a resident of the town of Poteau, in the State of Oklahoma, for damages in a jurisdictional amount which petitioner claims he suffered in injury to his person and his property in a col-

lision between an automobile operated by petitioner with an ambulance operated by an employee of respondent on the streets of Fort Smith, Arkansas. Respondent, as defendant in the court of first instance, filed his answer which raised triable issues but did not file a counter-claim or cross-complaint to petitioner's complaint. After issue joined, Respondent took petitioner's deposition in discovery proceedings, and the court held a pretrial conference but no order of any kind was entered as a result. About six months later and while the case was thus pending on the complaint and answer and while no order, interlocutory or otherwise, had been made by the court, petitioner filed his motion for leave to dismiss his suit without prejudice, and offered to perform such terms and condition as the court should deem proper. Petitioner's stated purpose in seeking a dismissal of his action without prejudice was to file suit against respondent in the State court at Poteau, Oklahoma, the residence and place of business of respondent. Respondent did not file a written response to petitioner's motion but appeared by counsel on a hearing on the motion and objected to a dismissal of the action without prejudice. The court denied petitioner's motion and, petitioner electing to stand on his motion, the court dismissed the action with prejudice to the bringing of another action on the same cause of action. On appeal the judgment of the court of first instance was affirmed in an opinion which appears in an Appendix to this petition.

ARGUMENT

Petitioner urges that the decision in this case is in conflict with other courts of appeal on the same matter.

In considering this question let it be stated the conditions existing at the time of the dismissal of this case by the district court, which were:

The case had been pending about six months; an answer had been filed, no other pleadings. It had never been placed on any calendar for trial. Petitioner-plaintiff had not been guilty of any delay in prosecuting the case; he had not been guilty of refusing to obey any order of the court. Petitioner offerd to pay all costs and to perform any conditions imposed by the court in dismissing the case. These are the indisputable facts which were applicable to plaintiff-petitioner's right to dismiss his case without prejudice in the trial court. In applying these indisputable facts the decision of the court below is in direct conflict with the decisions of every other court of appeal which has had the question under consideration.

The decision conflicts with the decisions of the Eighth Circuit. The rule in that Circuit is clearly set forth in the following language taken from Home Owners Loan Corporation v. Huffman, 134 F. 2nd 314.

> "The order of dismissal complained of involves the application of 41 (A) (2) of the Rules of Civil Procedure. The pertinent language of the rule reads: ' . . . an action shall not be dismissed (after service of answer) at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper'
>
> "The effect of this rule is to confer upon the

court in all civil actions the equitable power to impose upon a plaintiff seeking to dismiss without prejudice 'such terms and conditions as the court deems proper.'

"It is obvious that such power, although judicial, is discretionary in its nature. Judicial discretion is variously defined. The sense in which the term is commonly used is defined in Bouv. Law Dict., Rawle's Third Revision, page 884, as 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.'

"The judicial discretion of the trial court in permitting a plaintiff to dismiss his suit under rule 41 after answer is filed does not extend to refusal to apply well-settled principles of law to a conceded or indisputable state of facts. Peterson v. John Hancock Mut. Life Ins. Co., 8 Cir. 116 F 2nd, 148, 151; Winchester Repeating Arms Co. v. Ol[illegible] 7 Cir. 203 F. 493, 494; In re Roth Co., 7 Cir. [illegible] 396, 398."

Where an appellate court has power to review the exercise of judicial discretion, the inquiry is confined to whether the situation and circumstances clearly show an abuse of discretion, that is, arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances. Hartford Empire Co. v. Obear-Nester Glass Co., 8 Cir., 95 F. 2nd 414, 417.

The rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs and when the defendant will not be subjected thereby to some plain legal prejudice beyond the incidental annoyance (as distinguished from prejudice) of a second litigation upon the same subject matter. Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 370, 59 S. Ct. 301, 83 L. Ed. 221; Jones v. Securities and Exchange Commissions, 298 U. S. 1, 19, 20, 56 S. Ct., 654 80 L. Ed. 1015; Ex Parte Skinner & Eddy Corp., 265 U. S. 86, 93, 44 S. Ct. 446, 68 L. Ed. 912; Pullman's Palace Car Co. v. Central Transp. Co., 171 U. S. 138, 146, 18 S Ct. 808, 43 L. Ed., 108; Olsen v. Muskegon Piston Ring Co., 6 Cir. 117 F. 2d 163, 165; Goldstein v. Philadelphia & Reading Coal & Iron Co., 3 Cir., 17 F. 2nd 482; United Motors Service v. Tropic-Aire, 8 Cir., 57 F. 2nd 486 f.; Hartford-Empire Co. v. Obear-Nester Glass Co., supra; City of Detroit v. Detroit City Ry. Co., C. C. 59 F. 569.

Since Rule 41 is declaratory of a long established practice in the courts and is intended only to clarify and make definite that practice, it should be construed with reference to the precdents. Prior to the adoption of the Rules of Civil Procedure the Supreme Court and the inferior federal courts had applied the rule in the cases cited supra and in many other cases. The decisions were reviewed at length by Judge Kenyon in United Motors Service v. Tropic-Aire (8 Cir. 57 F. 2nd 479, 486 f.) wherein he said that the question to be determined upon appeal from an order granting a dismissal without prejudice after trial at the instance of the plaintiff is: "Did the defendant lose any substantial right by the dismissal?"

A later case to the same effect is New York, Chi-

cago & St. Louis Railroad Company v. Vardaman, 181 F. 2nd 769, from which the following language is taken:

> "The basic principle of law involved here is stated in Federal Rules of Civil Procedure, Rule 41 (a) (2) 28 U. S. C. A. that an action shall not be dismissed save upon order of the court and 'upon such terms and conditions as the court deems proper.' The judicial discretion thus authorized has been construed to allow dismissal, upon payment of costs, 'unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.' (Citing.) Cone v. West Virginia Pulp & Paper Co., 330 U. S. 212, 67 S. Ct., 752, 91 L. Ed. 849; Home Owners Loan Corporation v. Huffman, 8 Cir. 134 F. 2nd 317. In determining this matter of 'plain legal prejudice' we are required on appeal, to accept the action of the trial court unless we find 'arbitrary action by failure to apply the appropriate equitable and legal principles to the established or conceded facts and circumstances.' Home Owners Loan Corporation v. Huffman. (Cited above.) Hartford-Empire Company v. Obear-Nester Glass Co. 8 Cir. 95 F. 2nd 414, 417." New York, Chicago & St. Louis Railroad Company v. Vardaman, 181 F. 2nd 769.

This case was decided by the United States Court of Appeals for Eighth Circuit in 1950, four years after the decision of the Supreme Court of the United States in the Cone v. West Virginia Pulp & Paper Co. case, and the Circuit Court, in its decision, adopts the views of the Supreme Court, as well as its language, in stating, "The judicial discretion thus authorized has been construed to allow dismissal, upon payment of costs, 'un-

less the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit.'"

In the Third Circuit the case of Peardon v. Chapman, 169 F. 2nd 909, is directly in conflict with the decision in this case. The trial court, after numerous hearings, pre-trial conferences, motions for summary judgment, finally tried in plaintiff's absence and dismissed with prejudice. On appeal the Court of Appeals reversed and ordered that the dismissal be without prejudice. The Court of Appeals made the following observation on the right of the plaintiff to a dismissal without prejudice in its decision:

> "On the occasion of the first postponement the Court had implied that the complaint would not be dismissed with prejudice. He thought at that time a continuance would be troublesome to the defendants. But this trouble has to be something more than the mere prospect of defending another suit in order to justify a dismissal with prejudice."

In the Seventh Circuit the decision of the Court in Grivas v. Parmelee Transportation Co., 207 F. 2nd 334, (Cer. Den. 347 U. S. 913, 74 Sup. Ct. 477; 98 L. Ed. 1069) is in conflict with the decision of the Court in this case as will appear from the following excerpt:

> "We now come to the vital question, that is, whether the District Court abused the sound judicial discretion which it was called upon to exercise in ruling upon plaintiff's motion to dismiss. The only reason disclosed in the record for the ruling is a statement made by the Court as follows: . . . 'the Court feels that the case, having been set for

trial and already then upon the trial call, and the defendant having acquired a right to be tried in the federal court, that had such a motion been granted it would have deprived the defendant of that right.' Defendant's contention under discussion is aptly answered in Therrien v. New England Tel. & Tel. Co., D. C. 102 F. Supp. 350, where the Court stated: "Dismissal and subsequent litigation in the State Court will of necessity preclude the defendant from trial here, but without a showing that it has acquired some right or that it seeks or has become entitled to affirmative relief, the denial of which would work actual prejudice to it, no valid objection will lie."

The area of conflict between the decision of the court below and the decisions of the other circuits cited is wide. In all of the other circuits, without exception, it has been held that the trial court must exercise a reasonable discretion in deciding whether a plaintiff may dismiss his case without prejudice under Rule 41a 2 of the Federal Rules of Civil Procedure and in the language of the Eighth Circuit in the case of Home Owners Loan Corporation v. Huffman, **supra:**

> "The judicial discretion of the trial court in permitting a plaintiff to dismiss his suit under Rule 41 after answer is filed does not extend to refusal to apply well settled principles of law or indisputable state of facts."

Under the indisputable state of facts in this case petitioner was entitled to have the court "apply well settled principles of law" to his application for leave to dismiss without prejudice. The rule applicable was

succinctly stated by the Eighth Circuit in the case last mentioned in the following language:

> "The rule has long prevailed in both law and equity that a plaintiff may dismiss his case without prejudice only by payment of the costs and when the defendant will not be subjected thereby to some plain legal prejudice beyond the incidental annoyance (as distinguished from prejudice) of a second litigation upon the same subject matter."

The court below in its decision refused to follow these well settled principles of law. Instead, for the first time in any reported case in a federal court it abolished the rule that it must be shown that a defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit, and instead held that where an action had been pending for some six months; depositions had been taken and a pre-trial conference held, a witness had been interviewed, and the plaintiff failed to show that he would be prejudiced by having to stay in the federal court. Respondent could not be prejudiced by any lapse of time involved for he was the defendant in the case and had not claimed any affirmative relief; any deposition filed in the case would be admissible in any other court in which the same cause of action might be filed and petitioner offered to stipulate that this might be done in its motion to dismiss. (Record 5.) The fact that a witness had been arranged for by Respondent had no bearing upon any prejudice he might suffer and the fact that a pre-trial conference had been held was of no possible importance in view of the fact that Respondent does not claim he would lose the advantage of anything connected with it and it was of so little importance that no record of any kind was made of the conference.

The widest conflict between the decision of the Court of Appeals in this case and of the decisions of all the other Courts of Appeal that have passed on the question involved lies in the statement in the opinion "That, certainly no reason prejudicial to his substantive rights was suggested for dismissal." The settled law in all of the other Circuits which we have cited is that the **defendant** must be shown to have acquired some right which he would lose or would suffer some plain legal prejudice by a dismissal. The court below puts the shoe on the other foot. The burden is placed on a **plaintiff** seeking a dismissal without prejudice under Rule 41 to show that he will suffer prejudice to his substantive rights by being compelled to stay in the federal court. This is the very antithesis of the law in all of the other Circuits. It places on a plaintiff a burden which few could carry, and grants an immunity to defendants in the Tenth Circuit which is not enjoyed by the litigants in any other circuit in the United States.

We now urgently submit that the Record in this case shows that the district court, in denying Petitioner leave to dismiss this case without prejudice, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision, as provided by the Rules of this Court.

The reasons given by the lower court in affirming the judgment of the district court were the reasons of that court alone and were not the reasons for the decision of the district court. In denying petitioner's motion the district judge stated:

"Now I have practiced under these rules since

they were formed, and I have never allowed anybody to dismiss a case without prejudice after the defendant had filed his answer and the defendant objected to it."

We submit that this is a situation that calls for the exercise of this court's power of supervision. The Federal Rules of Civil Procedure have been approved by the Congress and are laws of the United States. If the district court for the Eastern District of Oklahoma had officially adopted a rule that no plaintiff would be allowed to dismiss his case after answer filed except by consent of the defendant such rule would be in plain derogation of Rule 41 (a) 2, and would, under the supervisory power of this Court, be abrogated. This court should not hesitate to strike down a rule which is so utterly and completely in derogation of the provisions of a public statute and so destructive of the rights of litigants in the eastern district of Oklahoma.

We urge upon the attention of the court that the rule of procedure under which Petitioner was denied a dismissal of his case without prejudice has been in force in the district from which this petition comes for twenty-five years, ever since the adoption of the Rules, and will continue in force if a writ is denied in this case for as long as the judge who adopted the rule presides over the court.

The adoption of the Rules of Civil Procedure wiped out the ancient common-law right of plaintiffs to dismiss their action whenever they felt it advisable to do so and gave in return the greatly reduced and restricted right afforded them under the Rules. In the interest of fairness and justice this Court should voice its disapproval of any decision which whittles away to the

vanishing point any rights which this Court and the Congress intended plaintiffs might have in dismissing their actions after answer filed in accordance with Rule 41 (a) 2.

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APPENDIX

IN THE
United States Court of Appeals
TENTH CIRCUIT

November Term - 1958

DONALD O. SHAFFER.....Appellant

vs. **Number 5955**

JAMES EVANS.....Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Clinton R. Barry on brief for Appellant.

Joseph A. Sharp (Truman B. Rucker, B. W. Tabor and Jack M. Thomas were with him on the brief) for Appellee.

Before PHILLIPS, MURRAH and LEWIS.

PER CURIAM.

The plaintiff appeals from an order of the trial court dismissing his suit with prejudice when he de-

clined to proceed further upon the court's denying his motion to dismiss the action without prejudice after the defendant had filed an answer. The sole contention on appeal is that the court erred in denying the motion to dismiss the suit without prejudice.

In the interest of protecting the rights of all the parties and accomplishing expeditious disposition of litigation, a motion by the plaintiff to dismiss after service of the defendant's answer or motion for summary judgment is addressed to the sound judicial discretion of the court. Rule 41(a)(2) F.R.C.P. Butler v. Denton, 150 F. 2d 687; Grivas v. Parmelee Transp. Co., 207 F. 2d 334; Larsen v. Switzer, 183 F.2d 850; Federal Savings & Loan Ins. Corp. v. Reeves, 148 F.2d 731.

This action had been pending for some six months at the time of the hearing on the plaintiff's motion to dismiss. Depositions had been taken, the defendant had made arrangements for medical testimony, and a pretrial conference had been held. The case had not been set down for trial, but apparently was ready for trial at the next jury term. Requiring the plaintiff to proceed under those circumstances in the court in which he had filed his action could hardly be termed arbitrary. Certainly, no reason prejudicial to his substantive rights was suggested for dismissal, and the trial court did not abuse its discretion in denying the motion.

The judgment is affirmed.